ration. At the first August rules, 1904, an amended declaration was filed and common order made, and at the second August rules the common order was confirmed. So that instead of filing his amended declaration at the first rules after the order of the court remanding the case to rules, as was declared to be the proper practice, the plaintiff delayed doing so from May to August. If a delay of two months is to be permitted, why not four, or any indefinite period. The court urges as one objection against requiring the plaintiff to serve new process upon the defendant to answer the amended declaration, that the defendant might be a nonresident, upon whom process could not be served. It seems that just as great an injustice might be done the defendant by the negligence and laches of the plaintiff in filing his amended declaration. The rule of practice, as stated by the court, is fair and reasonable enough, but, as it seems to us, should be more strictly complied with than was done in this case.

BUTTON *v.* STATE CORPORATION COMMISSION OF VIRGINIA.

Aug. 17, 1906.

[54 S. E. 769.]

Insurance — Election of Commissioner — Construction of Constitution.—Act March 9, 1906 (Laws 1906, p. 122, c. 112), establishing a bureau of insurance, in providing that the commissioner of insurance shall be elected by the General Assembly, does not contravene Const. art. 12, § 155, providing that the State Corporation Commission shall annually elect one of its members chairman of the same, and shall have one clerk, one bailiff and such other clerks, officers, assistants, and subordinates as may be provided by law, all of whom shall be appointed by the Commission; and that the General Assembly may establish within the department, and subject to the supervision and control of the Commission, subordinate divisions, or bureaus of insurance, banking, or other special branches of the business of that department; the power of appointing the insurance commissioner not being given by the Constitution to such Commission, but his election being intrusted to the General Assembly by the provisions authorizing it to establish the bureau of insurance.

Petition of Joseph Button for mandamus to the State Corporation Commission of Virginia. Writ awarded.

WHITTLE, J. At a special term of this court, convened at the instance of the Governor of the commonwealth in the city of Richmond July 31, 1906, a peremptory writ of mandamus was awarded, commanding the State Corporation Commission to allow Joseph Button, who had been chosen commissioner of insurance for the state of Virginia by the General Assembly, and commissioned as such by the Governor, to qualify before them by taking the oaths of office and executing a bond as required by law.

The commission had declined to permit the petitioner to qualify, entertaining the opinion that the provision in the act of March 9, 1906, for the election of the commissioner of insurance by the General Assembly was in conflict with section 155 of the state Constitution, and void. The sole question, therefore, for our determination was the constitutionality of that act.

The provisions of article 12, § 155, of the Constitution, involved in this controversy, are as follows:

"The commission shall annually elect one of their members chairman of the same, and shall have one clerk, one bailiff and such other clerks, officers, assistants and subordinates as may be provided by law, all of whom shall be appointed, and subject to removal, by the commission. It shall prescribe its own rules of order and procedure, except so far as the same are specified in this Constitution or any amendment thereof. The General Assembly may establish within the department, and subject to the supervision and control of the Commission, subordinate divisions, or bureaus of insurance, banking or other special branches of the business of that department."

The Commission denied the constitutionality of the statute in the particular mentioned, maintaining that section 155 of the Constitution devolved the duty upon them of appointing the Insurance Commissioner.

Though the question before us lies in narrow compass, it is of more than ordinary importance, and in approaching the consideration of it there are certain fundamental principles which must not be lost sight of. Thus, in a government such as ours of reserved powers, the legislative department acknowledges no superiors except the federal and state Constitutions, and its authority to enact laws unless forbidden by one or the other of those instruments in express terms or by necessary implication, is paramount. Smith *v.* Commonwealth, 75 Va. 904; Virginia-Tennessee C. & I. Co. *v.* McClelland, 98 Va. 424, 36 S. E. 479. Moreover, there is an obvious distinction between the construction of grants of power by the federal Constitution to Congress and grants of power by the state Constitution to the General Assembly. In the first case the grant is the sole source of congressional power, and is, therefore, to be construed strictly, while in the latter the grant, being merely declaratory of pre-existent power, is to be construed liberally. In the one instance the expositor must search for constitutional sanction authorizing the enactment; in the other, the quest must be for constitutional limitation forbidding it. The Constitution is in no sense a grant of power to the Legislature, but it is a limitation to its general powers.

So it has been said: "In the partition of power between the three departments of government, the power of making laws is

conferred on the General Assembly. Some laws they are compelled by mandate to make. Other laws they are forbidden to make. These are the only lim 's to their powers. All subjects of legislation not affected by mandate, nor by prohibition, are within the discretion of the General Assembly." Commonwealth *v.* Drewry, 15 Grat. 1, 5.

It has also been held, that "the Constitution of the United States is a source and grant of power to the Congress of the United States. It is an enabling and not a restraining instrument. Congress can do nothing except what the Costitution, either directly or by reasonable construction, authorizes it to do. The Constitution of Virginia, however, is a restraining instrument, and the Legislature of the state possesses all legislative power not prohibited by the Constitution." Brown *v.* Epps, 91 Va. 726, 21 S. E. 119, 27 L. R. A. 676.

These propositions are axiomatic, and lie at the very foundation of our institutions.

As corollary to the foregoing postulates arises the rule of construction, that in a doubtful case it is the province of the courts to resolve all doubts in favor of the constitutionality of the act of the Legislature.

"Plenary powers in the Legislature for all purposes of civil government is the rule. A prohibition to exercise a particular power is an exception. In enquiring, therefore, whether a given statute is constitutional, it is for those who question its validity to show that it is forbidden." Cooley's Const. Lim. p. 105.

The decisions of this court abound with illustrations of the rule.

It is said: "We can declare an act of General Assembly void only when such act clearly and plainly violates the Constitution, and in such manner as to leave no doubt or hesitation on our minds." Commonwealth *v.* Moore & Goodsons, 25 Grat. 951, 953.

Again: "Upon the most familiar principles, repeatedly declared by the decisions of the Supreme Court of the United States, and of the Supreme Courts of all the states, and by none more emphatically than by this court, every statute is presumed to be constitutional. It cannot be declared by the courts to be otherwise unless it be made clearly so to appear. The Legislature is omnipotent in making laws, unless restrained by the express or implied provisions of the state or national Constitution." Virginia-Tennessee Coal & Iron Co. *v.* McClelland, 98 Va. 424, 36 S. E. 479.

It is also a familiar doctrine, that legislative construction of the Constitution is under certain circumstances of great importance in constitutional exegesis. 6 Am. & Eng. Ency. of Law, 932, and cases cited in note 9.

The following decisions exemplify the general rule:

"That this is the true construction of the Constitution is also shown by the contemporaneous exposition of it by the Legislature, which assembled immediately after its adoption, and organized the departments of government according to its provisions." Chahoon *v.* Comth., 21 Grat. 822, 827, 828.

"The construction placed on the Constitution of the state by the Legislature thereof is entitled to consideration; and, in case of doubt, should be influential in its construction, but cannot be permitted to overturn plain language." Day *v.* Roberts, 101 Va. 248, 43 S. E. 362.

Furthermore it has been declared that "When a state Legislature is authorized by the Constitution to establish offices, the failure to expressly authorize the prescribing of qualifications therefor does not impliedly preclude the exercise of that power." 6 Am. & Eng. Encv. of Law, 934, citing State *v.* McAllister, 38 W. Va. 485, 18 S. E. 770, 24 L. R. A. 343.

The court in that case recognizes the well-settled distinction between the rules of construction applicable to a grant of power by the federal Constitution to Congress and by the state Constitution to the General Assembly, holding that the power of the Legislature is supreme, except where restrained by the Constitution.

We entertain no doubt that in the absence of constitutional authority it would be entirely within the competency of the General Assembly of Virginia to establish an officer a bureau of insurance; and, in our opinion, there is nothing in the language of the Constitution which either expressly or by fair implication limits that power.

The language in question, which declares that the General Assembly may "establish within the department, and subject to the supervision and control of the Commission, subordinate divisions or bureaus of insurance, banking, or other special branches of the business of that department," is general and attaches no limitation to the exercise of the power. As remarked, the General Assembly, subject only to clear constitutional limitation, is supreme; and its authority to "establish" a "bureau" of insurance, without qualifying provisions, of itself imports the organization of an officered department.

In Webster's International Dictionary the verb "to establish" is defined: "To appoint or constitute for permanence, as officers, laws, regulations," etc. And the same high authority gives as the equivalent of "bureau:" "A department of public business requiring a force of clerks; the body of officials in a department who labor under the direction of a chief."

Bouvier, in his Law Dictionary, says of the word "bureau:" "In the classification of the ministerial officers of government,

and in the distribution of duties among them, a bureau is understood to be a division of one of the great departments of which the secretaries or chief officers constitute the cabinet."

It is a fair deduction, therefore, from these definitions, that the word "bureau," in the connection and sense in which it is used in the Constitution, implies, not merely a division where business is to be conducted under certain rules and regulations, but includes the operating force as well. At all events, if it was the intention of the constitutional convention to use the word "bureau" in its narrower sense, and thereby deprive the General Assembly of an acknowledged and important governmental function, it is but reasonable to assume that such purpose would have been manifested in unequivocal terms.

The contention of the Commission is that they are clothed with the power of appointing the commissioner of insurance by the language, "The Commission shall annually elect one of their number chairman of the same, and shall have one clerk, one bailiff, and such other clerks, officers, assistants, and subordinates as may be provided by law; all of whom shall be appointed, and subject to removal, by the Commission."

The collocation of the foregoing provision with respect to the paragraph authorizing the establishment of a bureau of insurance tends to show that it was not designed to embrace the head of that department.

But whether much or little weight be given to the connection and position of the respective provisions, it must be allowed that the application of the rule of ejusdem generis to the enumerated class excludes therefrom the commissioner of insurance.

"It is a general rule of statutory construction that where general words follow an enumeration of persons or things, by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned." Black on Interpretation of Laws, 141.

At page 145, the learned author observes: "A statute which enumerates persons or things of an inferior rank, dignity, or importance, is not to be extended by the addition of general words to persons or things of a higher rank, dignity, or importance, than the highest enumerated, if there are any of the lower species to which the general words can apply."

This seems to be a universal rule of interpretation (Endlich on Interpretation of Statutes, § 412; Sutherland on Stat. Constr. § 277; City of Lynchburg *v.* N. & W. Ry. Co., 80 Va. 237, 250, 56 Am. Rep. 592), and its application to the case in judgment forbids that the general word "officer" shall be interpreted to

include the head of a bureau, who is an officer of higher grade than those specifically enumerated in the constitutional provision.

We are not disposed to admit that the construction which we have placed on section 155 of the Constitution will materially impair the efficiency of the Commission; but let the result be what it may, the principles of law and sound public policy alike demand that we interpret the Constitution as we find it, without undertaking to construe language of doubtful import so as to enlarge the powers of one department of the government at the expense of another.

The court was actuated by these considerations in reaching the conclusion, heretofore announced, that the mandamus prayed for ought to be awarded.

Note.

This case decides that the General Assembly of Virginia is still paramount in some matters, and will not dip its plume even to the State Corporation Commission. We cannot see what purposes of public policy were to be subserved by taking from the Commission the power of appointing the commissioner of insurance, and giving it to the General Assembly. But that is a matter for the legislative and not the judicial department, and, in our opinion, this decision will meet with the unqualified approval of the profession. This insurance Act was commented on in August number of the Register, p. 333.

INTERNATIONAL HARVESTER CO. *v.* SMITH.

Sept. 13, 1906.

[54 S. E. 859.]

1. **Appeal—Jurisdiction—Amount in Controversy.**—Where, in a suit on a note for less than $300, the judgment would be decisive as to plaintiff's rights with respect to a sum greater than $300, which was the amount necessary to sustain a writ of error to the Supreme Court, the amount in controversy was sufficient to sustain a writ of error to such court.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, §§ 233-240.]

2. **Sales—Warranty.**—Where there is an express warranty in the sale of a chattel, there can be no implied warranty except as to title.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, §§ 760, 761.]

3. **Same—Subject-Matter of Sale—Delivery—Inferiority of Article Delivered.**—Where defendant purchased a new machine from plaintiff's agent, but an old machine was, by fraud or mistake, delivered in lieu of that bargained for, defendant, after discovering the fraud, was